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No. 01-714

IN THE

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Appellants,

v.

DONALD L. EVANS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. UTAH'S INJURIES ARE REDRESSABLE	1
II. IMPUTATION IS A FORM OF "SAMPLING"	2
A. Appellees' Focus On Whether Sampling Is "Pre-Meditated" Is Indefensible	3
B. Imputation Violates § 195 Regardless Of How The Relevant "Sample" Is Defined	7
C. Occupancy And Status Imputation Are Especially Unlawful Under The Census Act	10
D. Deference Is Inappropriate	11
III. IMPUTATION IS NOT A METHOD OF "ACTUAL ENUMERATION"	12
A. Imputation Is Incompatible With The Original Understanding Of An "Actual Enumeration"	12
B. Appellees' Attempts To Sidestep The Original Understanding Are Unpersuasive	14
C. Appellees Fail In Their Attempts To Shoehorn Imputation Into The Original Understanding	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 11
Brown v. *Gardner*, 513 U.S. 115 (1994) 12
Christensen v. *Harris County*, 529 U.S. 576 (2000) 11
Department of Commerce v. *Montana*, 503 U.S. 442 (1992) 1
Department of Commerce v. *United States House of Representatives*, 525 U.S. 316 (1999) ..... *passim*
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 11
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 1, 2, 7, 18
Nixon v. *United States*, 506 U.S. 224 (1993) 16
United States v. *Classic*, 313 U.S. 299 (1941) 17

STATUTE AND REGULATION

Pub. L. 105-119, 111 Stat. 2480 2
Census Undercount Adjustment: Basis for Decision, 45 Fed. Reg. 69,366 (Oct. 20, 1980) .. 15

LEGISLATIVE HISTORY

Amendment of Title 13, United States Code, Relating to Census, Hearing on H.R. 7911 Before the House Comm. on Post Office and Civil Serv., 85th Cong. (1957) 5
H.R. Rep. No. 85-1043 (1957) 5

SCHOLARLY AUTHORITIES

W. Edwards Deming, *Sample Design in Business Research* (1960) 6, 8
Arlene Fink, *How to Sample in Surveys* (1995) 6, 8

TABLE OF AUTHORITIES—continued

Page

Gary T. Henry, *Practical Sampling* (Applied Soc. Res. Methods Series Vol. 21, 1980) 7, 8
M. Kendall & W. Buckland, *A Dictionary of Statistical Terms* (1957) 6, 8
Leslie Kish, *Survey Sampling* (1967) 6, 8
Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration"* 77 Wash. L. Rev. 1 (2002), *available at* http://www.law2.byu.edu/Faculty_Pub/Article_acutal_enumeration.pdf 12
Frank Yates, *Sampling Methods for Censuses and Surveys* (2d ed. 1953) 6, 8, 9

OTHER AUTHORITIES

1 *Records of the Federal Convention of 1787* (M. Farrand ed., 1966) 16
31 *The Writings of George Washington* (John C. Fitzpatrick ed., 1931) 19
8 *The Writings of Thomas Jefferson* (Andrew A. Lipscomb ed., 1903) 19
Bureau of the Census, *Report to Congress—The Plan for Census 2000* (Aug. 1997) 5, 8
Samuel Johnson, *Dictionary of the English Language* (4th ed. 1773) 13
Thomas Sheridan, *Complete Dictionary of the English Language* (6th ed. 1796) 13
Noah Webster, *A Compendious Dictionary to the English Language* (1806) 15

I. UTAH'S INJURIES ARE REDRESSABLE.

As the Solicitor General acknowledges, Utah's claims "are justiciable under this Court's decisions in *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992), and *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992)." US Br. 12. North Carolina's jurisdictional arguments were raised and rejected in those two cases and in any event they are meritless.

North Carolina's principal argument is that Utah's injury is not redressable because the "deadlines prescribed for executive action" under the Census Act would preclude the President from forwarding a revised apportionment count to the Clerk of the House. NC Br. 25. Although North Carolina suggests that its argument "was not directly addressed by any of the briefs in *Franklin*," *id.* at 27, in fact the Solicitor General's brief in that case expressly argued that "[t]he time limits" imposed by the Census Act "foreclose any opportunity for judicial review." Brief for Appellants 32, *Franklin* v. *Massachusetts* (No. 91-1502) (U.S. filed April 13, 1992). This Court rejected that argument.

Justice O'Connor's opinion (a four-Justice plurality on the standing issue) concluded that the President has authority to revise the census, and presumed that he would do so if presented with a count revised pursuant to a court order. *Franklin*, 505 U.S. at 803 (O'Connor, J., joined by Rehnquist, C.J., and White and Thomas, J.J.). Justice Stevens (writing for a four-Justice concurrence) went even further, concluding that the President has no power to "modify the census results reported by the Secretary" and thus would be *required* to forward a revised count to the Clerk of the House. *Id.* at 811 (Stevens, J., joined by Blackmun, Kennedy, and Souter, J.J.).[1]

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[1] As the Solicitor General notes, North Carolina's position is also foreclosed by *Department of Commerce* v. *Montana*, 503 U.S. 442 (1992), where this Court rejected a similar argument. *Id.* at 459.

Justice Stevens also explained more explicitly the fundamental flaw in the suggestion that the statutory timing provisions preclude review. He noted, even if "the President's report to Congress . . . signaled the end of a census-adjustment process, that would be relevant only in determining when a challenge was ripe." *Id.* at 815 n.13. Finality of executive action under a statute, in other words, is a *prerequisite*, not a *bar*, to judicial review.

The fact that Congress enacted a statute in 1997 authorizing "*prospective* relief against the Bureau's use of statistical methods," NC Br. 29-30 (citing Pub. L. 105-119, Title II, § 209(a)(8), 111 Stat. 2481), is similarly unhelpful to North Carolina. While the statute recognizes that post-census relief may be ineffective in some circumstances, it contains no language foreclosing such relief. Moreover, such a construction would impede the statute's stated purpose "to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States."[2] Pub. L. 105-119, § 209(a)(1).

II. IMPUTATION IS A FORM OF "SAMPLING."

Section 195's prohibition against "sampling" plainly condemns imputation under the definition embraced by the Bureau itself prior to this litigation: it uses data on a portion of the population to make inferences about the population as a whole. See Ut. Br. 18. This construction is also consistent with definitions accepted among statisticians, with the history of the Census Act, and with this Court's decision in

[2] If North Carolina's argument were accepted, the Bureau's use of imputation would be effectively unreviewable under § 195. A pre-census challenge would not be available because, as North Carolina concedes, "the distributive effects of imputation [on apportionment] cannot be determined in advance." NC Br. 30 n.15. And North Carolina's suggestion that individual voters could bring a dilution action challenging redistricting, *id.* at 30 n.15, ignores the fact that § 195 applies only to the use of sampling for apportionment, not for redistricting.

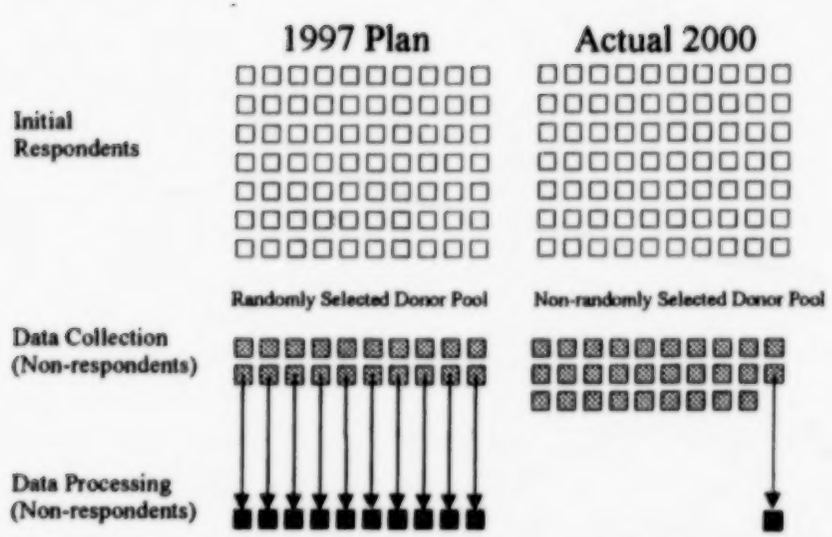
Department of Commerce v. *United States House of Representatives*, 525 U.S. 316, 324 (1999). Ut. Br. 20-22.

Appellees' attempts to limit the statutory term in a way that excludes imputation are unpersuasive. To be sure, they now refuse—and properly so—to defend the district court's adoption of the Bureau's principal theory below—that § 195's reference to "sampling" refers only to *random* sampling. Instead, appellees now claim that sampling involves a "deliberate" or "*conscious design* to contact only a subset of the population, *guaranteeing* that not all the population will be contacted," whereas "imputation is used only after" the Bureau has attempted "to contact every unit." NC Br. 38 (emphasis added); see US Br. 17 n.3; *id.* at 18-22. This definition and proposed distinction—like those embraced by the district court—are not only indefensible, they ignore the fact that imputation is as much a form of sampling as the procedure invalidated in *House of Representatives*.

A. Appellees' Focus On Whether Sampling Is "Pre-Meditated" Is Indefensible.

Appellees' reliance on the fact that the Bureau's use of imputation was not "conscious" or "deliberate" is misplaced—not only because it fails to distinguish this case from *House of Representatives*, but also because a decision to accord any significance to that fact would render § 195 virtually meaningless. Although appellees carefully stop short of arguing that *House of Representatives* was wrongly decided, or that Congress acted unwisely in broadly prohibiting the use of "sampling" in the census, their argument implicitly advances both of those propositions.

1. Like the sampling procedure proposed by the Bureau in 1997 ("1997 Plan"), imputation entails a deliberate, pre-meditated decision to estimate housing units that the Bureau failed to count. This point is made clear by the diagram from page 9 of Utah's opening brief (the accuracy of which is not in dispute):



Under both the 1997 Plan and the procedure used in the 2000 census, the Bureau first contacts all 100 units in the hypothetical tract by mailing census questionnaires, recognizing that (a) only 70 of those units are likely to respond, and (b) enumerators will have difficulty contacting some of the remaining 30 units during the non-response follow-up process ("NRFU"). To address that concern, the Bureau assembles a "donor pool," consisting entirely of units (the shaded boxes) that did not return a questionnaire, but were counted during NRFU. By "conscious design," the Bureau then estimates each unit that remains uncounted at the conclusion of NRFU.

Specifically, the Bureau "imputes" to each such unit (the black boxes) the occupancy characteristics of a single "sample" unit, which is the estimated unit's nearest neighbor that was included in the donor pool. Thus, both procedures consist of the same two "conscious" and "deliberate" steps: (1) a "data collection" phase, where the Bureau obtains information from counted units that will eventually comprise the donor pool, and (2) a "data processing" phase, in which the Bureau assigns data from a donor unit to an uncounted unit.

Nor are the two methods distinguishable on the related ground offered by appellees—that § 195 does not extend to methods of sampling that follow an initial attempt to "contact

every unit." NC Br. 38; see US Br. 21-22. Under the 1997 Plan, the Bureau would have attempted to "contact every unit" by mail. See *House of Representatives*, 525 U.S. at 324. In any event, the notion that the Bureau has made "every effort" to "contact every unit," NC Br. 38, means only that sampling was used as a "supplement to"—and not a "substitute for"—an enumeration, and that distinction is legally irrelevant. 525 U.S. at 342.

Finally, the notion that the 1997 Plan is more deliberate than imputation in that it contemplates a specific percentage of units that will be estimated following NRFU is similarly illusory. Under the 1997 Plan, the Bureau expressly anticipated that in some census tracts, more than 90% of the units would respond by mail—thus leaving the number of units to be estimated unspecified, and determined by the fortuity of the mailback response rate. Bureau of the Census, *Report to Congress—The Plan for Census 2000*, at 28, 37 (Aug. 1997) ("Census 2000 Report") (AR C00160, C00169).

2. In any event, appellees' distinctions have no bearing on whether a method of estimation qualifies as "sampling." First, in *House of Representatives*, this Court resolved an ambiguity in the Census Act by reference to the nearly 200-year-old requirement of "a complete enumeration" unaltered by any statistical adjustment. 525 U.S. at 337. This same historical context indicates that the Congress that enacted § 195 was hardly focusing on the distinctions proposed by appellees. Indeed, "sampling" appeared in the statute in 1957 for the purpose of authorizing the Bureau to seek non-apportionment data (like that now sought in the "long form") from a "portion of the universe." *Amendment of Title 13, United States Code, Relating to Census, Hearing on H.R. 7911 before the House Comm. on Post Office and Civil Serv.*, 85th Cong. 7 (1957); see H.R. Rep. No. 85-1043 at 10 (1957). The authorization of sampling, in other words, was merely a license to gather non-apportionment data by "less than a complete enumeration," *id.*—an exception to the then-existing

requirement that "every item of information and all particulars required for any census" be obtained by personal visits to every household. 525 U.S. at 336. Clearly, the Congress that authorized such use of sampling would not have limited the Bureau's efforts to collect non-apportionment data to methods that announced in advance a premeditated number of households required to answer long-form type questions. The point was merely to relax the requirement of a complete enumeration for such purposes.

Second, appellees offer no persuasive support for their assertion that the scholarly understanding of sampling requires the predetermination of a fixed percentage of the population to be estimated. In fact, the principal source relied on by North Carolina, Frank Yates, *Sampling Methods for Censuses and Surveys* (2d ed. 1953); NC Br. 34, also cited by the Solicitor General, US Br. 19, contradicts appellees' definition. Yates notes that sampling may be used in a "complete census" in which an initial attempt is made to contact all households, Yates, *supra* at 128, as a "way of dealing with non-response," *id.* at 130. The method of sampling discussed by Yates is the same technique used by the Bureau under the name of imputation: after an attempt to enumerate everyone, "initial non-respondents who subsequently respond can be treated as a sub-sample of all initial non-respondents." *Id.* Thus, it is incorrect to suggest that the scholarly notion of sampling requires a conscious decision not to count a specific percentage of the population.[3]

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[3] To the contrary, in the field of statistics the term "sampling" can refer to any technique for gathering data from something less than an entire population—even where the sample design focuses not on observing a particular percentage of the population, but on "some portion of the universe that happens to be handy." W. Edwards Deming, *Sample Design in Business Research* 32-33 (1960). For example, an effort to gather data only from individuals that happen to respond to a mailed questionnaire is a form of "nonprobability sampling." *Id.*; *accord* Arlene Fink, *How to Sample in Surveys* 17 (1995); Leslie Kish, *Survey Sampling* 19 (1967); M. Kendall & W. Buckland, *A Dictionary of Statistical Terms* 42 (1957); Gary T. Henry, *Practical Sampling* 18 (Applied Soc. Res. Methods Series Vol. 21, 1980).

Third, appellees' distinctions would nullify the statute and eviscerate this Court's holding in *House of Representatives*. Under appellees' approach, the Bureau could circumvent § 195 merely by postponing (or concealing) the precise extent of its intent to use sampling until after its enumeration efforts were complete—thereby creating the impression that its decision was not pre-meditated. And, so long as the Bureau made some initial attempt to "contact every unit" and did not specify a precise percentage of the population that would not be contacted, the Bureau could estimate increasing portions of the population—up to and exceeding that proposed under the 1997 Plan. The Bureau itself does not dispute that it could do so by adjusting the scope and intensity of its enumeration efforts. Congress could not have intended the ban on sampling to turn on such facile changes in methodology.

Nor should Congress be presumed to have intended a standard as unworkable as the one proposed by appellees. Under this standard, litigation would inevitably follow every decision to use sampling in the census, leaving the courts to resolve unanswerable questions such as whether the Bureau had made a sufficient attempt to "contact every unit" and whether it sufficiently contemplated a specific percentage of units to be estimated—thus assuring that the census will perpetually "generate[] a number of reapportionment controversies." *Franklin*, 505 U.S. at 791. Fortunately, however, Congress has enacted legislation forbidding the use of *all* forms of sampling in the census.

B. Imputation Violates § 195 Regardless Of How The Relevant "Sample" Is Defined.

Appellees also err in their assertion that Utah's construction of sampling "rests on a simple layman's misunderstanding of

the word 'sampling.'" NC Br. 33; see US Br. 24-25. It is true that "'[a]mong professional statisticians, the term "sample" is reserved for instances when the selection of the smaller population is in fact based on the methodology of their science.'" US Br. 26-27 (emphasis omitted); see NC Br. 34-35. Imputation is unquestionably based on the "methodology of [statistical] science." In fact, the Bureau itself describes imputation as a "statistical methodology," and makes clear that "[i]mputation relies on the statistical principle of 'homogeneity,' or the tendency of households within a small geographic area to be similar in most characteristics." *Census 2000 Report* at 23, 56 (AR C00155, C00188).

Moreover, appellees are mistaken in their assertion that the statistical literature limits the term "sampling" to "a survey of a subset of the population that will *itself* be an adequate 'model' of the larger population," and that the "donor units used in the imputation method" are not samples in this sense. NC Br. 34 (emphasis added) (quoting Yates, *supra* at 2). First, the statistical literature expressly rejects the notion that a "sample" must itself be a model of the full population. See Deming, *supra* at 32-33; Fink, *supra* at 17; Kish, *supra* 19; Kendall & Buckland, *supra* at 42; Henry, *supra* at 18. This is confirmed not only by the extensive scholarly definitions cited in Utah's opening brief, Ut. Br. 21 (defining sampling to encompass any attempt to draw inferences about the full population from a subset), but even by the Yates text cited by appellees for this proposition, NC Br. 34.

The Yates quotation in North Carolina's brief is taken out of context from a section that simply makes the point that an "incomplete census" in which "there has been a failure to obtain information from a substantial proportion of the units" should not be treated as a random, representative "sample" of the full population. Yates, *supra* at 2. That rather obvious criticism in no way implies, however, that individual housing units *can never* be used as "samples" or as part of a method of "sampling." As noted above, *supra* at 6, Yates elsewhere

acknowledges the potential for the use of individual housing units as "samples" in what Yates calls "[t]he simplest way of dealing with nonresponse" when conducting a "complete census." Yates, *supra* at 130.

This sort of sampling theory is precisely what is behind the Bureau's method of imputation. The "initial non-respondents who subsequently respond" are those that are placed in the "donor pool." They are then used as a "sample" of the "final non-respondents" on the statistical assumption that such samples are "expected to be more like the initial non-respondents than the general population." And the resulting estimates are ultimately aggregated to enable the Bureau to make inferences about "the larger population." Thus, while an individual housing unit is not *itself* a "model of the larger population," there can be no doubt that it is a "sample" in the sense that it is chosen as a model of sub-sets of that population (*i.e.*, the unobserved addresses) with an eye toward estimating the population as a whole.

But even if North Carolina were correct that the relevant "sample" is the entire donor pool rather than each individual donor unit, that would not help the appellees distinguish imputation from the 1997 Plan. In the previous example, the donor pool used in both procedures consists of 20 randomly selected units under the 1997 Plan, and 29 non-randomly selected units under hot-deck imputation. Under North Carolina's argument, the donor pool in each case is the relevant "sample" because it is deemed representative of the "population" (really a sub-population) of all initially non-responding units. Further, in each case some *subset* of that sample—the ten donors in the 1997 plan and the single donor in the imputation example—is used to draw an inference about the relevant population. And in each case (ironically), the means by which that inference is drawn is the same, namely, assigning to each unobserved, non-sampled unit the occupancy characteristics of an observed, sampled unit. Accordingly, even under North Carolina's definition, if the

Bureau's 1997 Plan constitutes unlawful "sampling," as this Court held, the imputation procedure at issue here clearly constitutes unlawful "sampling" as well.

Thus, once again appellees' argument cannot be adopted without silently overruling this Court's decision in *House of Representatives*. Indeed, the *only* notable difference between the donor pool used in hot-deck imputation and that prescribed by the 1997 Plan is that the former was selected on a non-random basis—and is therefore less representative of the population it is used to estimate. Thus, although appellees wisely have abandoned the random/non-random distinction, the result they seek would revive that distinction through the back door—producing the perverse result that the random (and relatively reliable) method in *House of Representatives* would be forbidden while the non-random (and relatively unreliable) method of imputation would survive. Congress clearly did not intend this absurd result.

C. Occupancy And Status Imputation Are Especially Unlawful Under The Census Act.

Although all forms of imputation constitute sampling, Utah explained in its opening brief that the use of "status" and "occupancy" imputation—used respectively to estimate units that are not known to exist, and not known to be occupied—is particularly unjustified. Ut. Br. 30-35. Appellees fail to respond to the bulk of that discussion. Their limited response focuses almost entirely on an obscure statement in a Census Bureau memorandum suggesting broadly that because 75% of all status-imputed addresses "had been added to the [Master Address File] during the 2000 census by field enumerators or by respondents themselves," "the Bureau had a substantial basis for regarding those units as valid residential addresses." US Br. 32 (quoting JA 445-47); see NC Br. 41. The mere fact that an address is added by a field enumerator, however, provides no conclusive information about whether it is a valid housing unit (and not, for example, a business) or whether it is occupied. Thus, appellees' attempt to rehabilitate status

imputation leaves unrebutted the undisputed fact that status and occupancy imputation fail even under the standards adopted by the district court and by the dissenting opinions in *House of Representatives*. See Ut. Br. 32-35.[4]

D. Deference Is Inappropriate.

Appellees' request for deference is equally unpersuasive. *Chevron* deference is inappropriate not only because the statutory language is unambiguous, but also because the Bureau's current construction (1) has never been articulated outside the context of litigation, *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 213 (1988), (2) "lack[s] the force of law," and therefore "do[es] not warrant *Chevron*-style deference," *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); (3) is inconsistent with the history of the decennial census, as well as the Bureau's own prior statements regarding the scope of § 195, Ut. Br. 23-25; and (4) raises grave constitutional doubts, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 574-75 (1988); Ut. Br. 46 n.13.

Equally unpersuasive is appellees' argument that Congress' 1976 reenactment of § 195 is evidence of its "acquiescence" in the Bureau's construction. Appellees simply make no

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[4] Similarly, North Carolina asserts that "over 90%" of occupancy imputations were based on returns that indicated the unit was "vacant," but for which some "'person information'" was provided. NC Br. 17 (quoting JA 447). But in the source cited for this assertion, the "over 90%" figure merely refers to the percentage of "Enumerator Returns," not the percentage of occupancy imputations in which "person information" was provided. Moreover, the existence of "person information" means nothing with regard to a unit's occupancy status as of April 1, 2000. The unit could well have been a vacation home, which would make that unit unoccupied for purposes of the apportionment count. Or it could have been completely vacant on April 1, 2000, but subsequently occupied by someone who moved in after that date but had already been enumerated elsewhere. *See* JA 443-450.

effort to establish that "the record of congressional discussion preceding reenactment makes [] reference to" any "interpretive position" by the Bureau concerning the statute's application to imputation, and thus under this Court's precedents § 195's "'re-enactment'" is "without significance," *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994).

III. IMPUTATION IS NOT A METHOD OF "ACTUAL ENUMERATION."

Hot-deck imputation also fails on the ground that it is not a method of "actual enumeration" as required by the Census Clause. Appellees' notion of an "actual enumeration" is thoroughly undermined by the historical record.[5] Their various attempts to sidestep the historical understanding are equally unpersuasive.

A. Imputation Is Incompatible With The Original Understanding Of An "Actual Enumeration."

Appellees first assert that an "actual enumeration" need not be limited to an actual count, but may broadly encompass any conceivable "method 'of ascertaining the number of' persons . . . within each State." US Br. 33; NC Br. 45. This notion of an enumeration, however, is incompatible with the original understanding of the constitutional terminology. The founding-era dictionary definitions of "enumeration" relied on by Utah here confirm that an enumeration is "an actual counting, and not just an estimation of number." *House of Representatives*, 525 U.S. at 346-47 (concurring opinion).

Appellees fail to offer any persuasive historical support for their more liberal notion of an enumeration. Tellingly, the

[5] The publication by one of appellants' counsel, Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration,"* 77 Wash. L. Rev. 1 (2002), from which Utah's briefs borrow, is available online at www.law2.byu.edu/Faculty_Pub/Article_actual_enumeration.pdf.

Solicitor General's definition is drawn not from founding-era materials but from a 1933 dictionary. US Br. 33. North Carolina's contention that estimation falls within Utah's founding-era definitions of "enumeration" as "the act of numbering or counting over" is no more persuasive. *Id.* The complete definitions make clear that the *method* of "numbering" or "counting over" contemplated by the verb "enumerate" is incompatible with a mere estimate: they do so by defining enumerate as "[t]o reckon up *singly*; to count over distinctly." Samuel Johnson, *Dictionary of the English Language* 658 (4th ed. 1773) (emphasis omitted); see also Thomas Sheridan, *Complete Dictionary of the English Language* (6th ed. 1796) (defining "enumerate" as "[t]o reckon up singly; to count over distinctly"). Thus, North Carolina's misleading parsing of the founding-era definitions cannot obscure the fact that, under those definitions, the constitutional language is simply "incompatible" with the use of statistical estimates. 525 U.S. at 347 (concurring opinion).

In any event, any supposed ambiguity in the dictionary definitions disappears upon examination of the unrefuted record put forward by Utah: (1) that an "actual enumeration" was an established term of art used in both America and Britain to distinguish between methods of statistical estimation and an actual counting of population, see Ut. Br. 39-41; (2) that the constitutional debate focused on the need to assure a "permanent and precise" standard for apportionment, and that delegates rejected alternatives on the ground that the rule for apportionment should be "fixt" rather than being based on an "estimate," *id.* at 41-43; (3) that statements by Washington, Jefferson, and Madison at the time of the first census show that the Framers understood an enumeration to be a specific method "required by the constitution," but which would necessarily result in an undercount, *id.* at 43-45; and (4) that "[f]rom the very first census . . . Congress has prohibited the use of statistical sampling" to adjust the apportionment count, initially

requiring personal visits, and then expressly prohibiting methods of "sampling," *House of Representatives*, 525 U.S. at 335. Because Utah's showing on these points stands unrefuted, appellees' conception of an enumeration must be dismissed as contrary to the original understanding.

B. Appellees' Attempts To Sidestep The Original Understanding Are Unpersuasive.

Appellees' attempts to sidestep the original understanding by invoking the Constitution's structure and its drafting history are equally unpersuasive.

1. The structure of the Census Clause does not help appellees. As amended by the 14th Amendment, Article I, Section 2, Clause 3 of the Constitution states (in what the Solicitor General calls the "Apportionment Clause") that "Representatives shall be apportioned among the several States according to their respective Numbers, counting the whole number of persons in each State." The Constitution then provides for "[t]he actual Enumeration" of such "[n]umbers" in a second provision (which he terms the "Census Clause"). According to appellees, the Census Clause addresses merely procedural issues such as timing, and the use of "the definite article" in that clause means that the "actual enumeration" provision may be dismissed as "implicit in what has come before." US Br. 33; NC Br. 46.

The notion that the "actual enumeration" provision is shorthand for an apportionment "according to . . . respective numbers, counting the whole number of persons in each State" is entirely circular. It begs the dispositive question of what the Framers meant when they referred to both an "actual enumeration" and a counting of "respective numbers." Thus, even if the "actual enumeration" were understood as synonymous with an apportionment "according to . . . respective numbers," the one-sided historical record before the Court suggests that *both* provisions were understood to contemplate an actual count.

Second, the constitutional structure also belies the notion that only the Apportionment Clause addresses methodology, and that the Census Clause addresses only the procedural question of timing. The Census Clause does prescribe the timing of the census—requiring the first census to be conducted "within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years." But the Census Clause also addresses the *nature* of the census—requiring an "actual enumeration" rather than something else. While the "enumeration" must be conducted "in such manner as Congress may direct," the tally has to be based on an "enumeration," not an estimate. Thus, the structure of the Census Clause merely reinforces the plain, original meaning of its language.

2. Appellees' reliance on the Capitation Clause in Article I, Section 9, Clause 4 is similarly incorrect. It may be that the "phrase 'Census or Enumeration herein before directed to be taken' can only be understood to refer to the 'actual Enumeration' mandated by Article I, Section 2, Clause 3." US Br. 34. But such equivalence is hardly a license to disregard the original understanding of an "enumeration." Instead, the fact that "census" and "enumeration" are treated as synonyms in the Constitution merely begs the question as to how those terms were understood in the founding era. Inasmuch as the historical record demonstrates a clear understanding of an "enumeration" that would contemplate an actual count and foreclose the use of estimates, the Capitation Clause merely suggests that the Framers understood "census" to mean the same thing, as founding-era dictionaries confirm. See, *e.g.*, Noah Webster, *A Compendious Dictionary to the English Language* 46 (1806) (defining "census" as "an enumeration of inhabitants, a register of people"); see also Census Undercount Adjustment: Basis for Decision, 45 Fed. Reg. 69,366, 69,371 (Oct. 20, 1980) (AR C01218) (stating that in the Bureau's view a "'census' is an official enumeration" and "not an estimate of the population").

3. The drafting history of the Census Clause is similarly unhelpful to appellees. First, the constitutional debates are hardly silent. Rather, they confirm the Framers' intent to require an actual count, and to eschew estimates, by indicating a preference for a "permanent and precise" standard, 1 *Records of the Federal Convention of 1787*, at 578 (M. Farrand ed., 1966), and by rejecting a "vague" rule that would turn on a mere "estimate" of wealth, *id.* at 561. Thus, when the Committee of Style added the words "actual enumeration" in place of the prior formulation of a "census," *id.* at 570-71, those words must have been seen as an important (but hardly surprising) clarification—and a vindication of the policy preferences expressly embraced in the debates.

Appellees seek refuge for their position in some stray language from *Nixon* v. *United States*, 506 U.S. 224, 231 (1993), but *Nixon* thoroughly condemns their approach. It is true, as appellees note, that *Nixon* says the courts "must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language." *Id.* But that presumption is entirely consistent with Utah's position: that an "actual enumeration" was a clarification that the "census" called for in earlier drafts was to be based on an actual count rather than an estimate.[6]

C. Appellees Fail In Their Attempts To Shoehorn Imputation Into The Original Understanding.

Finally, acknowledging that an actual enumeration may "demand[] some form of individualized counting process,"

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[6] Appellees also ignore an alternative rationale offered by the Court in *Nixon*, which *clearly* forecloses their approach here. 506 U.S. at 231-32 (noting that treating the words added by the Committee of Style as "a mere 'cosmetic edit'" would "constrain us to say that the *second to last draft* would govern in every instance where the Committee of Style added an arguably substantive word," and that such an approach "is at odds with the fact that the Convention passed the Committee's version").

NC Br. 48, appellees argue that imputation still satisfies that requirement. These arguments are similarly misguided.

1. Appellees' assertion that the Framers never expressly foreclosed methods employed only as a "last resort" after an "exhaustive actual enumeration," US Br. 44; NC Br. 48, is both irrelevant and wrong. The notion that the specific method at issue "is one with which the framers were not familiar" is simply insignificant. *United States* v. *Classic*, 313 U.S. 299, 316 (1941). Thus, it may be that the Framers did not expressly condemn methods in the precise mold of imputation. But they did condemn estimation, and the constitutional language expresses their intent to reject all methods that have that effect.

In any event, the assertion that the Framers were unfamiliar with combining a statistical estimate with a partial enumeration, and meant to condemn only so-called "gross estimates," US Br. 45; NC Br. 48, is also inaccurate. During the founding era, Americans and Britons alike supplemented partial enumerations with partial estimates. And even in this context, they consistently used the term "enumeration" to distinguish the two methods. See Ut. Br. 47.

2. Moreover, appellees' proposed constitutional rule is the antithesis of the "permanent and precise" standard the Framers intended. The proposed inquiries into whether the Bureau's enumeration efforts are sufficiently "exhaustive," whether a particular estimate is "gross" rather than "fine," and whether an adjustment adequately advances some notion of "accuracy" are inherently imprecise. Thus, appellees' standard must be rejected because it would replace the "permanent" and "fixt" standard of an actual enumeration with an ever-changing rule to be sorted out by a debate among statisticians.

Appellees also miss the point in asserting that imputation only "mitigates rather than increases" the potential for manipulation in the actual enumeration. US Br. 23; NC Br.

50. Imputation undoubtedly does mask the effects of cut-backs in enumeration efforts, but that is precisely the problem. The discretion to choose among a range of methods of statistical adjustment provides cover for politicians who would otherwise be revealed as making politically motivated changes in the census.[7] See Ut. Br. 27-30.

Finally, appellees are mistaken in their suggestion that only hypothetical methods of statistical adjustment (and not imputation) open possibilities for manipulation. NC Br. 49. In designing imputation procedures, the Bureau has broad discretion to affect the nature and extent of its use. Such decisions may increase the apportionment count by only about 53,000, as in the 1990 census, by nearly 1.2 million, as in the 2000 census, JA 45, or by a much greater margin if the Bureau were to choose to cut back on its enumeration efforts.

The potential for manipulation of apportionment is perhaps most obvious after the census has been completed. At that point, the Bureau, the Secretary, and even the President are faced with the decision whether to utilize the imputation adjustment as calculated, or to limit the apportionment numbers they submit to the Clerk of the House to the actual count. See *Franklin*, 505 U.S. at 798 ("[T]here is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data are submitted to him"); *id.* at 815, n.13 (Stevens, J., concurring) (noting that "the Secretary may modify the census figures"). Such a decision would be even more politically charged than the current administration's decision to reject statistical adjustment for non-apportionment purposes. That fact alone raises the Framers' concerns about partisan manipulation.

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[7] In a purely *enumerative* census, the political motivations behind a proposal to cut back on follow-up visits would be easily discernible. But once statistical adjustments are introduced, the political motives for such a change may be masked by subjective disagreements among statisticians.

3. Appellees also err in their attempt to justify imputation on accuracy grounds. For one thing, the argument fails in its premise. The Framers well understood that the "real numbers [would] exceed, greatly, the official returns" from the actual enumeration, 31 *The Writings of George Washington* 329 (John C. Fitzpatrick ed., 1931) (emphasis added), and that "omissions" in the enumeration would be "very great," 8 *The Writings of Thomas Jefferson* 236 (Andrew A. Lipscomb ed., 1903) (emphasis added). Their prescription of an actual enumeration accepted that shortfall as the necessary price of a fixed, permanent apportionment standard. Thus, even if a statistical method could be shown to "move the census count closer to the actual population in each State," NC Br. 44, it still would not be a method of actual enumeration.

In any event, contrary to appellees' argument, the record below belies the unsupported speculation that imputation may improve accuracy. North Carolina is mistaken when it asserts that without imputation the Bureau will "knowingly disregard actual persons, and the census will have consciously identified *less* than the 'whole number of persons in each State.'" *Id.* This is demonstrably false for status and occupancy imputation, where the Bureau has no knowledge as to whether an imputed unit is occupied, or even whether it is a housing unit at all. Moreover, as explained in greater detail in Utah's opening brief, imputation's non-random method of estimation is more likely to produce an overcount than to correct for any undercount. Ut. Br. 28-29.

Even if imputation could be shown to improve numerical accuracy, the only relevant form of accuracy for apportionment purposes is distributive accuracy. On that point, the Bureau has acknowledged that it cannot show that imputation is an improvement over an actual count. JA 228. North Carolina speculates that imputation "*can* improve distributive accuracy" if it is used in states that "turn out to have comparatively low record-return or data-capture rates." NC Br. 43 n. 22. That speculation is both contradicted by the

Bureau's concession and completely unhelpful. The mere fact that some States may have "comparatively low record-return or data-capture rates" does not mean that imputation will improve distributive accuracy. Such low rates may not reflect an undercount, but rather a comparatively large number of unoccupied units, uncompleted construction, vacation homes, errors on the master address file, etc. If so, imputation will distort—not improve—distributive accuracy.

4. Finally, appellees' attempt to tie imputation's fate to the Bureau's use of data gathered from "proxies" (such as neighbors, landlords or postal workers) is misguided. Utah does not contend that enumerators must rely only on "personal observation," NC Br. 49, or "literally to count every head," US Br. 42. Rather, the standard drawn from the textual and historical record is that the Bureau must conduct an actual count, and may not substitute an estimate for such a count.

Thus, enumerators may rely on a range of information about the occupancy of a particular housing unit—on physical observation, on information provided by members of the household, or on information provided by third parties. What they may not do is to substitute a mere estimate for information specific to the housing unit in question. Thus, contrary to appellees' argument, the line between proxy data and imputation is not merely a difference in degrees of "evidentiary reliability." NC Br. 49. Rather, the line is a principled distinction between methods that rely on occupancy information specific to the unit in question and methods that do not. This is the difference between an "actual enumeration" and what the Bureau did here.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

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